

Brewery Workers Local 1016, IBT (American Malting Incorporated) and David M. Pawelek. Case 3-CB-3713

March 19, 1982

DECISION AND ORDER

BY MEMBERS JENKINS, ZIMMERMAN, AND HUNTER

On October 28, 1981, Administrative Law Judge Michael O. Miller issued the attached Decision in this proceeding. Thereafter, the Charging Party filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings, and conclusions¹ of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

¹ In sec. II.B, "Analysis and Conclusions," of his Decision, the Administrative Law Judge inadvertently states: "Respondent had no practice of paying for such time and the Union had no basis on which to claim payment." The word "Respondent" should be "American" (the Employer).

DECISION

STATEMENT OF THE CASE

MICHAEL O. MILLER, Administrative Law Judge: This case was heard in Buffalo, New York, on August 24 and 25, 1981, based upon a charge filed by David M. Pawelek, an individual, on October 7, 1980,¹ and a complaint issued on behalf of the National Labor Relations Board, herein called the Board, by the Regional Director for Region 3 of the Board, on November 14.

The complaint alleges that Brewery Workers Local 1016, International Brotherhood of Teamsters, herein called the Union, violated Section 8(b)(1)(A) of the National Labor Relations Act, herein called the Act, by failing fairly to represent Pawelek. The Union's timely filed answer denies the commission of any unfair labor practices.

All parties were afforded full opportunity to appear, to examine and to cross-examine witnesses, and to argue

orally. The Union filed a brief which has been carefully considered.

Based upon the entire record, including my observation of the witnesses and their demeanor, I make the following:

FINDINGS OF FACT

I. THE UNION'S LABOR ORGANIZATION STATUS AND JURISDICTION—PRELIMINARY CONCLUSIONS OF LAW

The complaint alleges, the Union admits, and I find and conclude that the Union is a labor organization within the meaning of Section 2(5) of the Act.

The Union is the collective-bargaining representative of the production and maintenance employees of American Malting Incorporated, herein called American or the Employer. American is a New York corporation engaged at Buffalo, New York, in the processing, sale, and distribution of malt, grain, and related products. Jurisdiction is not in issue. American annually manufactures, sells, and distributes from its Buffalo plant products valued in excess of \$50,000 which are shipped directly from said plant to States of the United States other than the State of New York. The complaint alleges, the answer admits, and I find and conclude that American is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Facts

The General Counsel contends that the Union unfairly, arbitrarily, or invidiously breached its duty to represent Pawelek during September 1980 by failing to process a grievance and by demanding that American "impose equal discipline upon [Pawelek] and another employee for an altercation which occurred between them in the plant on working time on or about July 21." The Union asserts that it represented Pawelek in regard to his grievance and denies that it sought an increase in Pawelek's discipline for his role in the altercation. Rather, it sought reduction of the discipline assessed against his fellow employee. Upon my careful evaluation of the facts as described below, I am compelled to agree with the Union.

David Pawelek has been employed by American for more than 8 years. He had secured his employment with the assistance of William Evens, the Union's business agent and business manager, a friend of his parents for 20 or more years. Pawelek was employed in the bargaining unit and was a member of the Union.

The collective-bargaining agreement between the Union and the Employer provides that employee grievances "relating to the interpretation or application of the Agreement" are to be taken up initially by the employee or his steward and the employee's foreman. Thereafter, if no satisfactory adjustment is reached, the matter is referred to the Union's secretary for attempted adjustment between higher representatives of the Union and the Employer. Final and binding arbitration is available for resolution of those grievances which are not resolved at this second step. Pawelek became a frequent grievance filer

¹ All dates hereinafter are 1980 unless otherwise specified.

from the start of his employment. According to Evens, Pawelek filed more grievances than all the rest of the unit employees combined. Pawelek recalled filing three or four grievances in 1974, alleging inequitable work distribution and supervisory harassment. Evens represented him on these grievances and resolved the work distribution issues to his satisfaction. However, Pawelek claimed that the supervisory harassment continued. Pawelek could not recall whether he filed any grievances in 1975 or 1976. He filed some grievances in the spring or latter part of 1977 but could recall no details beyond the fact that he was satisfied with the quality of the Union's representation.

It was in 1977 or 1978, Pawelek alleges, that Evens began to fail properly to process his grievances. He illustrated this with the following example: Sometime during this period, a fellow employee, Ralph Graf, had angrily accused Pawelek of making false statements about Graf. Pawelek, who understood a grievance to be any problem which one wrote down and gave to the Union for correction, filed a grievance against Graf. Evens came to the plant and told both Pawelek and Graf, "Shake hands or go settle it out on the dock"; i.e., fight it out. Graf and Pawelek shook hands and went back to work; Pawelek was satisfied. However, he complained that he never got a written answer to his grievance.

On January 22, 1979, Pawelek was suspended without pay for 2 days for failure to perform his duties as instructed. He filed a grievance on February 7, 1979, and, as a result of the Union's representation, the Employer agreed to reduce his discipline to a single day's suspension and a warning that future misconduct or violation of company rules and practices would result in more severe penalties.

On July 25, Pawelek became involved in a physical altercation with Dick Kiener, a fellow employee. Allegedly, Kiener attacked Pawelek at his work station. Pawelek told Supervisors Bill Shaw and Larry Benkstein about the assault and they told him to file a grievance. Pawelek did so. Because of chest pains stemming from the altercation, American took Pawelek to the hospital for X-rays where, following an examination, he was told to take the remainder of the day off. In addition to his grievance, Pawelek filed a harassment complaint in Buffalo City Court, charges against Kiener under the Union's constitution, and a claim for workmen's compensation.

American's executive vice president, Robert Limburg, called Evens and told him of the fight and both of them then investigated the circumstances. Witnesses told Evens that it had been basically a shoving match. Limburg spoke to employee witnesses; he tried to talk to Pawelek but Pawelek refused to discuss it with him. Because of Pawelek's pending court action, Limburg and Evens decided to hold up on the processing of Pawelek's internal union charges and on the Employer's determination regarding discipline.

About August 15, Pawelek felt that he was being harassed by his supervisor, Benkstein, because of the fight with Kiener. This harassment, he contended, made him nervous to the point of being ill and he went to the office to ask that someone take him to the hospital. Limburg, who was in the office at the time, told Pawelek

that he would not be compensated for the day if he left. American transported him to the hospital, where he was given a tranquilizer and sent home.

In the following week, Pawelek received his pay and noted that he had not been paid for the day on which he had gone to the hospital. When he complained to Shaw, he was told that he would not be paid for the day. On August 19, Pawelek filed a grievance complaining of the harassment by Benkstein and of the Employer's failure to pay him for the lost day.² On August 20, Pawelek was given a disciplinary action notice for his alleged negligent performance, on August 14, of assigned duties and for his failure to meet established work standards. The notice was signed by Shaw and Benkstein. Pawelek filed no grievance against this discipline.

About August 22, according to Pawelek, a meeting was held between the Employer and the Union in regard to his August 19 grievance. Evens was present. Pawelek believed that he was being poorly represented³ and stated that, if there were going to be a meeting, he wanted his own attorney present. He left the meeting and it continued without him. Subsequently, Pawelek received the Employer's reply, denying that Benkstein's discussions with him concerning the performance of his assigned duties were harassment and asserting that the Employer had no policy of paying employees for lost time except where an employee had sustained a physical injury on the job. It also denied that Benkstein's reprimand of him was related to any prior incidents.

Pawelek asked Evens about his grievance several times thereafter. Each time, according to Pawelek, Evens told him, "[Don't bother me] with that shit. Just be lucky you got your job."

Evens had attempted to investigate Pawelek's grievance but none of the employees to whom he spoke had witnessed the alleged harassment. He met with the Employer's representatives in late September, he recalled, in a meeting to which Pawelek had been invited but refused to attend, and accepted the Employer's positions that there had been no harassment and that its policies did not provide for pay for lost time under these circumstances.⁴

The collective-bargaining agreement between American and the Union does not provide for sick leave. According to Limburg's credible testimony, American only pays for lost time where an employee has sustained a compensable physical injury. The only exception occurred when the Employer, in order to induce an emotionally troubled employee to leave the plant before he hurt himself or someone else, acceded to a request to pay that employee for the lost time.

² Pawelek gave few details of this alleged harassment in the course of his testimony. The grievance alleges not only the harassment but also a threat by Benkstein to issue a reprimand to Pawelek if Pawelek grieved. The record contains no probative evidence of such a threat.

³ Pawelek initially testified that he stated that at this meeting. On cross-examination, he acknowledged that he only believed, but had not verbalized his belief, that he was being poorly represented.

⁴ It is not clear from this record whether the meeting which Evens described as having taking place in late September is the same as that placed by Pawelek on or about August 22. There are certain similarities about them.

After Pawelek's harassment complaint against Kiener in Buffalo City Court was adjourned in contemplation of dismissal, but prior to the actual dismissal thereof, Limburg decided on the discipline to be given both belligerents. Each was to receive a reprimand; additionally, Kiener would be suspended for 3 days. Pawelek was called into Limburg's office and was told: "We have come to a conclusion on the answer on how to resolve this." Limburg then described the discipline decided upon.⁵ Limburg also informed Evens and Union Steward Jim Lipa about his decision. Evens came to the plant and he and Lipa met with Pawelek. They repeated what Limburg had said about the discipline. Pawelek told them that he was not satisfied, he disapproved, and he wanted no discipline at all. According to his own testimony (corroborated in substantial part by both Evens and Lipa), Pawelek told Evens that, if Evens had anything to say, he would like it in writing for his own attorney. Evens replied, "[Don't] give [me] any of that legal bullshit." Pawelek asked Lipa if he had heard that statement and Lipa acknowledged that he had. Pawelek then began to walk out of the office and, as he was leaving, Evens told him that he was 95 percent of the trouble in the Company. Again, Pawelek asked whether Lipa had heard what Evens had said and was told that he had. Evens then told Pawelek, "You are nothing but a punk." Lipa acknowledged hearing that as well.

On cross-examination, Pawelek further testified that Evens had told him that he (Evens) would not settle for anything less than a 3-day suspension and a letter of reprimand for both Pawelek and Kiener. Pawelek then admitted that that is what he understood from Evens and Lipa having said that Evens believed both Kiener and Pawelek should receive equal punishment. Pawelek admitted that Evens never told him that the Union was going to seek an increase in his discipline.

Pawelek filed no grievance over the letter of reprimand given him for his involvement in the altercation. Kiener, however, did grieve his discipline. In processing that grievance, Evens expressly sought the reduction of Kiener's penalty to that assessed against Pawelek. When the Company refused to accede to this position, the Union took Kiener's grievance to arbitration and prevailed. Both employees thus received the same penalty, a letter of reprimand.

The General Counsel contended that Evens had failed to process Pawelek's grievance and had sought to equalize the discipline assessed against Pawelek with that given Kiener because of animus borne by Evens against Pawelek. That animus allegedly arose out of an unhappy but unrelated business dealing between Evens and Pawelek's parents in early 1977. Evens and his son had rented a garage from Pawelek's parents in which to conduct an automotive repair business. They had occupied it from February 1976 until February 1977. The Evenses were not satisfactory tenants to the senior Paweleks and the lease was not renewed. Thereafter, Evens, who had been a regular customer at the Paweleks' tavern, ceased to fre-

quent that establishment. David Pawelek was entirely unaware of these events for at least a year thereafter.

Evens denied that he bore any animus against David Pawelek because of his business dealings with Pawelek's parents. However, he candidly acknowledged that he did not like Pawelek. He had received a number of complaints about Pawelek from Pawelek's fellow employees and believed Pawelek to be a destructive element in American's small business. He did not wish to see Pawelek's conduct, including repeated grievance filing, cause American to fail. As noted, the Union had continued to process grievances satisfactorily for Pawelek in both 1977 and 1979, subsequent to the alleged dispute.

B. Analysis and Conclusions

The facts herein speak for themselves and warrant little discussion. There is not an iota of evidence to indicate that the Union sought, for reasons good or bad, to increase the discipline assessed against Pawelek for his role in the altercation with Kiener.⁶ There was, I conclude, no union conduct which could be considered as a breach of any duty owed to Pawelek. In reaching this conclusion I note, *inter alia*, that Pawelek filed no grievance against his discipline. Thus, he did not ask the Union to do anything in regard to it. The Union had received a grievance from Kiener and prosecuted it successfully. The remedy the Union sought and achieved for Kiener was clearly not unwarranted in the circumstances presented and had no adverse effect upon Pawelek. Moreover, fighting among employees was prohibited in the plant and as a participant in a fight Pawelek expected to receive some discipline. The discipline he received was the mildest possible under the circumstances.

Similarly, I can find no breach of the Union's duty of fair representation in its refusal to further process Pawelek's grievance against Benkstein, which sought the lost day's pay. Respondent had no practice of paying for such time and the Union had no basis on which to claim payment. Moreover, the Union did look into Pawelek's harassment claim and unsuccessfully sought to have Pawelek attend the meeting with Limburg and Benkstein. In light of Pawelek's refusal to cooperate, his history at American, including a prior warning for similar conduct, and the Union's record of satisfactorily representing Pawelek on other grievances, I cannot conclude that Evens' acceptance of the Employer's position and its refusal to take Pawelek's grievance to arbitration was unreasonable or for arbitrary or invidious reasons.

CONCLUSION OF LAW

The Union has not engaged in the unfair labor practices alleged in the complaint.

⁵ Pawelek testified initially that Limburg had told him that the Company and the Union had decided on this discipline. He admitted that he had concluded this from Limburg's having said "We have come to a conclusion."

⁶ The General Counsel did not dispute this conclusion. When confronted with the facts, the General Counsel raised an alternative argument, contending that Evens' and Lipa's statements to Pawelek, to the effect that the Union would seek equal punishment, implied that they would seek greater punishment for him and thus constituted a threat arising out of Evens' animus toward Pawelek. Such an allegation is outside the ambit of the complaint before me. Were it properly pleaded, I would reject it as being unwarranted from the facts herein.

Upon the basis of the foregoing findings of fact, conclusions of law, and the entire record in this proceeding, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER⁷

The complaint herein is dismissed in its entirety.

⁷ In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.